

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JULY 25, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

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No. 94-2547

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

GORDON SENN,

Plaintiff-Respondent,

v.

**BUFFALO ELECTRIC
COOPERATIVE and
FEDERATED RURAL
ELECTRIC INSURANCE
CORPORATION,**

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Buffalo County:
DANE F. MOREY, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Buffalo Electric Cooperative and Federated Rural Electric Insurance Corporation (the cooperative) appeal a judgment awarding Gordon Senn \$79,029 damages¹ for losses he sustained due to "stray voltage"² at

¹ The total damages were assessed by the jury in the amount of \$131,700. The jury attributed 60% of the negligence to the Cooperative and 40% to Senn.

his dairy farm. Following a twelve-day jury trial, the jury returned a verdict finding the cooperative negligent and that stray voltage from the cooperative was a substantial factor in causing Senn's damages.

Three issues are presented, namely, whether: (1) the evidence is sufficient to support the jury's finding of negligence and causation; (2) the trial court should have excluded Senn's expert's testimony because it was based upon unreliable data; and (3) a new trial is required due to trial court errors.³ Because credible evidence supports the verdict and under the "general relevancy" test the trial court properly admitted the expert testimony, we reject the cooperative's challenges. We affirm the judgment.

FACTS

We set forth facts of record supporting the verdict. *Fehring v. Republic Ins. Co.*, 118 Wis.2d 299, 305-06, 347 N.W.2d 595, 598 (1984). Senn's expert witness, Gerald Bodman, is an agricultural engineer, a professor at the University of Nebraska Department of Biological Systems Engineering and works as a consultant with farmers. There is no dispute that Bodman is a qualified expert. Bodman testified generally regarding the various factors affecting milk production, including genetics, housing, feed, veterinary practices, milking procedures and stray voltage. He testified that by eliminating each factor as a cause for unsatisfactory milk production, he can determine the cause of the problem. He testified that for most cows, one-half volt will cause a response and that cows receiving shocks when eating or drinking will reduce intake resulting in lowered milk production.

Bodman's evaluation of Senn's farm revealed that the cooperative contributed extraneous voltage of about .56 volts. Based on his own testing,

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² *Kolpin v. Pioneer Power & Light Co.*, 162 Wis.2d 1, 10, 469 N.W.2d 595, 598 (1991), described "stray voltage" as neutral to earth voltage, a natural phenomenon present in all active distribution systems, that can come from a variety of sources both on and off the farm. In unreasonably high amounts flowing along paths that conduct electricity such as metal and water, it becomes harmful.

³ The cooperative makes six arguments, but because of overlap, we organize our discussion into three issues.

Bodman concluded that the cooperative's primary distribution system contributed voltage at a level that would cause harm to the health and production of the cows. Bodman's tests showed that excessive voltage drop on the primary neutral system as a result of on-farm loads caused the elevated voltage.⁴ He further testified that "the resistance of the total primary neutral return system was too high." He further concluded that "the grounding was not adequate for the particular situation to prevent the harmful voltages and currents from showing up in the Senn barn." Bodman later learned that after the farm was isolated in September 1992, production did not improve as he had anticipated.⁵

Both before and after the farm was isolated, the cows exhibited low milk production, restlessness, abnormal tail twitching, poor milk out and reproductive problems. Charles Krueger, an artificial insemination technician for 21st Century Genetics, testified that neither genetics, management nor feed were the cause of Senn's cows' reproductive problems. Several witnesses testified that Senn's farming practices were above average and that factors such as nutrition, housing, genetics and milking practices did not account for the problems he was having with his herd.

Because the cows' production did not improve after the farm was isolated, Senn had additional testing done by Donald Woychik, an electrician. The trial court qualified Woychik as a lay expert and permitted him to testify to his observations based upon his testing, but not draw scientific conclusions.⁶

⁴ Bodman explained:

As the on-farm loads or on-farm energy use increased, having a greater demand for current from the primary system, the voltages increase. That is what we call an off-farm voltage, that current going through the neutral develops a voltage drop because of more on-farm loads. So it's off-farm voltage due to on-farm loads, normal use of electricity.

⁵ Bodman testified: "When we isolate the neutral, it simply means we have broken, we have taken apart all connections between the primary and secondary neutral system." When connected, "voltage present at this location on the primary will be reflected at this point on the secondary." The purpose of isolation is to eliminate the cooperative's stray voltage.

⁶ Woychik testified that he has been a dairy farmer and electrician for 35 years. He had been appointed by the Secretary of Agriculture to serve on the first State of Wisconsin Task Force on stray voltage involving farm animals. He attended seminars and was a co-presenter of a stray

Woychik obtained readings of eight milliamps and twenty milliamps in cow contact areas with a resistor. "So then we shut the farm down by opening the main disconnect at the top of the post. ... It made no difference."

Bodman reviewed Woychik's measurements on the eve of trial and concluded that current was accessing the cows in two ways: one path was through the neutral system which Bodman had documented through his own testing; the other was through ground currents as documented by Woychik.⁷ Bodman testified that he was familiar with the techniques that Woychik uses to measure voltage and current and that they were satisfactory from an engineering point of view.⁸ Bodman testified that based on all the information, including Woychik's testing, to a reasonable degree of probability, the source of the problematic currents was the cooperative's primary neutral system.

At Woychik's suggestion, Senn eventually relocated his dairy herd to a new farm. He testified that he made no significant changes with

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voltage clinic for farmers along with a representative from Northern States Power Company in La Crosse. His first investigation regarding stray farm voltage was in 1985. He has been involved in evaluation for stray voltage and other production concerns on more than 200 farms. He has worked with several creameries, including Land O' Lakes, Mid-American Dairies, Associated Milk Producers, Valley Queen and Wisconsin Dairies, to evaluate farm production problems. He has "worked many times with Dr. Bodman."

⁷ Woychik described one of his methods: After the farm was isolated he later installed two ground rods in the barn in each feed manger where the cows eat on one side of the barn. Then,

we drilled a hole through the concrete on a row of cows opposite, which would be about 16 feet apart. ... [W]e took eight foot ground rods and we put them through the concrete about two feet, so there was about six feet sticking in the air. Then we hooked the wire from each ground rod to the meter and we measured the current flow from one ground rod to the other ground rod. [W]e were getting current readings and our question was where are they coming from?

He testified: "If you do have a reading, why is it there when there's no power on the farm? That was the main purpose of my testing."

⁸ Bodman testified that he had not tested for ground currents because "with the significance of the changes when we separated the neutrals, I left feeling that I had found the solution, when in fact I had found only part of it."

respect to nutrition, housing, genetics and milking procedures, but milk production greatly increased.

SUFFICIENCY OF THE EVIDENCE

The cooperative argues that insufficient evidence supports the jury's findings of negligence and causation. We are unpersuaded.

[A] jury verdict ... will be sustained if there is any credible evidence to support the verdict. ... The credibility of the witnesses and the weight afforded their individual testimony is left to the province of the jury. Where more than one reasonable inference may be drawn from the evidence adduced at trial, this court must accept the inference that was drawn by the jury.

Fehring, 118 Wis.2d at 305-06, 347 N.W.2d at 598. We review the record for credible evidence to sustain the jury's verdict, not to search for evidence to sustain a verdict the jury could have reached, but did not. *Id.* at 306, 347 N.W.2d at 598.

The cooperative argues that the evidence is insufficient because Bodman did not testify that the ground currents were caused by the cooperative. The record discloses otherwise. Bodman testified that the problematic currents accessing the cows after isolation emanated from the cooperative's primary neutral system.

Q. Based on all of this then, and the testing that Mr. Woychik did, you indicated you came to the conclusion there were problematic levels of current still accessing the cows, were you able to come to an opinion to a reasonable degree of probability as to the source of those problematic currents?

A. Yes. ... They are emanating from the primary neutral system.

The cooperative argues that its expert, engineer Matt Schwarz, testified that Woychik's testing could not identify the source of the ground currents. The cooperative argues that because (a) the source of the ground currents could not be identified, and (b) it was not shown that the ground currents exceed an ordinary and reasonable standard for distribution of electric power, insufficient evidence supports the verdict. The cooperative contends that because isolation of the farm did not result in improved production, the cooperative's stray voltage could not have caused the harm.

The cooperative's argument fails for two reasons. First, because Bodman's and Schwarz's testimonies conflict, the argument is essentially one of weight and credibility, an issue that is in the exclusive province of the jury. *Id.* at 305, 347 N.W.2d at 598. The determination of credibility is not within the scope of appellate review. *Day v. State*, 92 Wis.2d 392, 400, 284 N.W.2d 666, 670-71 (1979).

Second, the cooperative's argument fails because it is based upon the faulty premise that there must be only one cause of harm. In order to reach its verdict, the jury is not required to find that the cooperative's negligence is the "only" cause. Under Wisconsin's "substantial factor" test, Senn need only demonstrate that the utility was negligent and that its negligence was a substantial factor in producing the harm. See *Sampson v. Laskin*, 66 Wis.2d 318, 325-26, 224 N.W.2d 594, 597-98 (1975). "[T]here may be several substantial factors contributing to the same result. The contribution of these factors under our comparative negligence doctrine are all considered and determined in terms of percentages of total cause." *Id.* at 325-26, 224 N.W.2d at 598 (footnote omitted).⁹

⁹ The jury was instructed that the verdict's cause questions do not ask about "the cause," but rather "a cause," and

[t]he reason for this is that there may be more than one cause of economic damage.

The negligence of one person may cause economic damage or the combined negligence of two or more persons may cause it. Before you find that a party's negligence was a cause of economic damage, you must find that the negligence was a substantial factor in producing the economic damage.

See WIS J I—CIVIL 1500, 1580. The record discloses that the cooperative did not preserve for

Bodman testified that his tests, along with Woychik's, showed that there were two paths by which excess voltage reached the cows: (1) the stray voltage produced by the utility's inadequate grounding, and (2) ground currents. Based on this record, the jury could infer that both paths of current would need to be eliminated in order for production to improve. Even if the source and level of the ground currents were unknown, Bodman's tests support the jury's finding that the cooperative's inadequate grounding resulted in excessive stray voltage at levels sufficient to be a cause of the lowered milk production.

The cooperative also argues that Senn produced no testimony as to the level of grounding necessary to eliminate the excessive voltage and that Bodman's testimony that grounding was inadequate was therefore speculative. We disagree. Bodman testified that inadequate grounding was a substantial factor in producing stray voltage. Whether Bodman's testimony was to be believed is a weight and credibility issue for the jury. The jury was not required to speculate. Because the cooperative has not demonstrated that Bodman's testimony is inherently incredible, we cannot rule that it is incredible as a matter of law. See *Chapman v. State*, 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975) (Incredible as a matter of law means inherently incredible, such as in conflict with the uniform course of nature or with fully established or conceded facts).

EXPERT TESTIMONY

Next, the cooperative argues that the trial court should have excluded Bodman's testimony because it was based upon Woychik's unreliable testing and therefore lacked foundation. The cooperative does not dispute that the evidence is relevant, that the witness was a qualified expert and that scientific or technical evidence would assist the trier of fact in determining an issue of fact. See *State v. Walstad*, 119 Wis.2d 483, 518-19, 351 N.W.2d 469, 487 (1984).

The cooperative's attack on Woychik's testing is two-pronged: (1) it challenges the underlying scientific principles as unestablished, and (2) it

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review an objection to these instructions or the form of the verdict.

challenges Woychik's technique and method of conducting the tests. It argues that without the trial court's threshold determination of reliability of both the scientific principles as well as the specific technique Woychik employed, his test results are not admissible. It contends that absent Woychik's tests, Bodman's testimony must be stricken because his opinion relied upon data not shown to be of a type reasonably relied upon by experts in his field. We disagree.

The trial court's decision to admit or exclude expert opinion testimony is discretionary and we do not reverse if the decision has a reasonable basis made in accordance with accepted legal standards and facts of record. *State v. Blair*, 164 Wis.2d 64, 74, 473 N.W.2d 566, 571 (Ct. App. 1991). Scientific evidence is admissible if: (1) it is relevant; (2) the witness is qualified as an expert; and (3) the evidence will assist the trier of fact in determining an issue of fact. *Walstad*, 119 Wis.2d at 516, 351 N.W.2d at 485-86.¹⁰ "Once the relevancy of the evidence is established and the witness is qualified as an expert, the reliability of the evidence is a weight and credibility issue for the fact finder and any reliability challenges must be made through cross-examination or by other means of impeachment." *State v. Peters*, No. 94-1094-CR, slip op. at 11 (Wis. Ct. App. Mar. 21, 1995, ordered published Apr. 25, 1995).

The basis of an expert's opinion may be one or more of the following: (1) firsthand observations made by the expert, (2) evidence presented at trial, and (3) data presented to the expert outside of trial. Section 907.03, STATS.¹¹ Opinion evidence may be based upon hearsay if "of a type reasonably

¹⁰ "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Section 907.02, STATS.

¹¹ Section 907.03, STATS., provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

relied upon by experts" in the field. *Id.* An expert may testify to an opinion with prior disclosure of underlying data. Section 907.05, STATS.¹²

Under *Walstad*, the trial court is not required to determine the reliability of the data underlying an expert's opinion. *Id.* at 518-19, 351 N.W.2d at 487. Here, there is no dispute that Bodman was qualified to render an expert opinion, that his opinion was relevant and would assist the jury in determining an ultimate fact. Our deferential standard of review requires that we look to the record for reasons to sustain the trial court's discretionary determination. *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). Bodman testified that he was familiar with Woychik's testing methods and that they were satisfactory from an engineering standpoint. In addition, Woychik testified at trial and was subject to vigorous cross-examination. Because Bodman's opinion was based upon data presented to the jury through Woychik's testimony, Bodman's underlying facts and data need not to have been shown to be reasonably relied upon by other experts in the field. See § 907.03, STATS. Because the reliability of Woychik's tests is a weight and credibility issue, *Peters*, slip op. at 11, we conclude that the trial court properly admitted his testimony as well as Bodman's opinions under Wisconsin's general relevancy approach.

The cooperative argues, however, that we should establish a rule excluding expert testimony based on tests not reasonably relied upon in the field of expertise. Relying on *Daubert v. Merrell Dow Pharmaceuticals*, ___ U.S. ___, 113 S.Ct. 2786, 2795 (1993), and a concurring footnote in *State v. Blair*, 164 Wis.2d 64, 78 n.9, 473 N.W.2d 566, 572 n.9 (Ct. App. 1991), the cooperative contends that the trial court should assess the reliability of the expert's underlying data.¹³

¹² Section 907.05, STATS., provides: "The expert may testify in terms of opinion or inference and give the reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

¹³ Objections to Wisconsin's general relevancy test have been articulated in the past. See Craig A. Kubiak, Comment, *Scientific Evidence in Wisconsin: Using Reliability to Regulate Expert Testimony*, 74 MARQ. L. REV. 261 (1991); Daniel Blinka, *Scientific Evidence in Wisconsin after Daubert*, 66 WIS. LAW. 10 (Nov. 1993); see also *State v. Peters*, No. 94-1094-CR (Wis. Ct. App. Mar. 21, 1995, ordered published Apr. 25, 1995).

Peters has rejected this argument. To the extent this argument seeks to overturn *Peters*, it is, of course, more properly directed to the supreme court. See *State v. Schumacher*, 144 Wis.2d 388, 404-05, 424 N.W.2d 672, 678 (1988) (supreme court is responsible for overseeing the statewide development and implementation of the law). The Court of Appeals is an error-correcting, not rule-making court. See *State v. Lossman*, 118 Wis.2d 526, 533, 348 N.W.2d 159, 163 (1984).

The cooperative also challenges the foundation for Bodman's testimony in other respects. It argues that because Woychik took one set of readings with a resistor and another set of readings without a resistor, Bodman's testimony is without foundation. We disagree. Bodman testified that he relied on his own tests as well as Woychik's. Bodman testified that he was familiar with Woychik's methods and that they were satisfactory. This argument essentially attacks the weight and credibility of Bodman's opinion, an issue not within the scope of appellate review. *Day*, 92 Wis.2d at 400, 284 N.W.2d at 670-71.

The cooperative also objects that Bodman based his opinion on certain assumptions regarding the nutrition and genetic potential of the herd, but that the testimony to support his assumptions was not produced. For example, the cooperative contends that Senn stated that the veterinarian's later testimony would be that nutrition did not impose a cap on production but that the veterinarian did not so testify.

We are unpersuaded. Whether the veterinarian's testimony did not support Bodman's opinion is not prejudicial on this record. Several witnesses testified with respect to feed and nutrition, genetic make-up, as well as housing milking procedures and farm management. The record is sufficient to establish adequate foundation.

MOTION FOR A NEW TRIAL

Finally, the cooperative argues that the trial court erroneously denied its motion for a new trial. The cooperative argues that the following trial court errors entitled it to a new trial pursuant to § 805.15(1), STATS.: (1) there was insufficient foundation to admit testimony concerning the ground currents; (2) Bodman's assumptions regarding nutrition were insufficient to support his

testimony; (3) no veterinarian testified that voltage was the cause of reduced milk production; and (4) Senn's veterinarian erroneously assumed that somatic cell count dropped during test isolation.

A motion for a new trial under § 805.15, STATS., is addressed to trial court discretion. *Sievert v. American Fam. Mut. Ins. Co.*, 180 Wis.2d 426, 431, 509 N.W.2d 75, 78 (Ct. App. 1993), *aff'd*, 190 Wis.2d 623, 528 N.W.2d 413 (1995). As we concluded, the expert testimony was properly admitted and supported the verdict. Although Bodman and the veterinarian did not analyze feed, other witnesses testified that feed was adequate. Bodman testified as to the relationship between harmful stray voltage and reduced milk production. We also conclude that the veterinarian's assumptions regarding somatic cell count are not prejudicial on this record. The record sufficiently supports the verdict. We conclude that the record supports the trial court's discretionary decision to deny the cooperative's motion for a new trial.

By the Court. – Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.